Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

(2)

No. 95-1482

In the Supreme Court of the United States

OCTOBER TERM, 1995

FERNANDO E. MATA, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a special agent of the Federal Bureau of Investigation (FBI) may obtain judicial review, under Title VII of the Civil Rights Act of 1964, of the revocation of his security clearance by the FBI.

2. Whether a special agent of the FBI may bring a *Bivens* action based on the allegedly retaliatory revocation of his security clearance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	12
Brandon v. *Holt*, 469 U.S. 464 (1985)	13
Brazil v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 116 S. Ct. 1317 (1996)	6, 7, 9, 13, 14
Brown v. *GSA*, 425 U.S. 820 (1976)	6, 7, 13, 14
Davis v. *Passman*, 442 U.S. 228 (1979)	14
Department of Navy v. *Egan*, 484 U.S. 518 (1988)	5, 6, 7, 8, 10
Dorfmont v. *Brown*, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991)	10, 11
Dubbs v. *CIA*, 866 F.2d 1114 (9th Cir. 1989)	11
FDIC v. *Meyer*, 114 S. Ct. 996 (1994)	13
Fields v. *Aspin*, 1993 WL 763357 (E.E.O.C. Dec. 23, 1993)	12
Guillot v. *Garrett*, 970 F.2d 1320 (4th Cir. 1992)	5, 6, 10
Hill v. *Department of Air Force*, 844 F.2d 1407 (10th Cir.), cert. denied, 488 U.S. 825 (1988)	11
Jamil v. *Department of Defense*, 910 F.2d 1203 (4th Cir. 1990)	5
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	9

Cases—Continued: Page

Perez v. *FBI*, 707 F. Supp. 891 (1988), opinion supplemented, 714 F. Supp. 1414 (W.D. Tex. 1989), aff'd, 956 F.2d 265 (5th Cir. 1992) 2, 12-13
Phillips v. *Dalton*, 1995 WL 95860 (E.E.O.C. Mar. 3, 1995) 12
Schroeder v. *Perry*, 1994 WL 735565 (E.E.O.C. Apr. 14, 1994) 12
South Dakota v. *Bourland*, 508 U.S. 679 (1993) 10
United States Information Agency v. *Krc*, 905 F.2d 389 (D.C. Cir. 1990) 11
Webster v. *Doe*, 486 U.S. 592 (1988) 5, 14

Constitution and statutes:

U.S. Const. Amend. V (Equal Protection Clause) 12
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
42 U.S.C. 2000e-3(a) 2
42 U.S.C. 2000e-16(a) 2
Rehabilitation Act of 1973, § 501, 29 U.S.C. 791 ..... 5, 9
5 U.S.C. 7513 ..... 5, 7, 9

Miscellaneous:

EEOC: Policy Statement on National Security Defense to Bias Charges, 8 Lab. Rel. Rep. (BNA) 405:6625 (May 1, 1989) 11
Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (1995) ... 15
§ 3.1(c), 60 Fed. Reg. 40,250 15
§ 5.2, 60 Fed. Reg. 40,252 15

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1482

FERNANDO E. MATA, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 71 F.3d 513. The order of the district court (Pet. App. 5a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1995. The petition for a writ of certiorari was filed on March 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Perez* v. *FBI*, 707 F. Supp. 891 (W.D. Tex. 1988), a class action filed on behalf of Hispanic FBI agents, the district court found that the FBI had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), by failing "to give Hispanic agents proper credit for their contributions, and consequently exclud[ing] the agents from promotions and benefits." R. 1031.[1] In addressing the named plaintiff's and class members' claims that the FBI had also unlawfully retaliated against them for pursuing their Title VII remedies (see 42 U.S.C. 2000e-3(a)), the court ruled that an employee claiming retaliation in violation of Title VII must demonstrate that, "but for" his or her participation in the Title VII legal proceedings, the adverse action would not have occurred. See 707 F. Supp. at 921-922. The court subsequently found that the FBI had retaliated against the named plaintiff, Perez, but ruled that there was no evidence of retaliation against other class members. *Id.* at 926; 714 F. Supp. 1414, 1433 (W.D. Tex. 1989), aff'd, 956 F.2d 265 (5th Cir. 1992) (mem.).

To provide a remedy for past discrimination, the district court appointed a panel of special masters to review the entitlement of those members of the class who had attained a rank of GS-13 or higher by May 5, 1989 (with one year experience), to "[r]ightful place seniority." 714 F. Supp. at 1417, 1435. The court limited the panel's powers to recommending individuals for promotion. *Id.* at 1421, 1436.

---

[1] Citations to "R." refer to page numbers in the record on appeal in this case.

2. Petitioner is a member of the plaintiff class in *Perez*. On January 24, 1990, the FBI Security Programs Manager, Gary L. Stoops, formally notified petitioner that the FBI had received information that he had disclosed classified information to unauthorized individuals, and that the FBI was suspending his access to national security information, pending investigation and final security clearance adjudication. R. 151. Following further investigation, Stoops issued, on August 13, 1990, a notice of proposed revocation of petitioner's security clearance. R. 165-170. That action was based on petitioner's admitted unauthorized disclosure of classified information to individuals representing the Cuban Government and his fabrication and embellishment of official reports to FBI Headquarters. R. 167. Stoops concluded that petitioner's continued access to national security information was not clearly consistent with the interests of national security. R. 168.

Petitioner was advised of his right to respond, R. 170, and did so through counsel, R. 172-186. He did not deny having disclosed classified information to unauthorized individuals, but he attempted to explain some of his disclosures as necessary in order to recruit an informant. Responding to the charge that he used poor judgment in handling FBI confidential sources, petitioner explained that it was necessary to establish close personal ties in order to gain the trust of potential informants. R. 177-178. He also asserted that the security clearance action was being taken by the FBI to retaliate against him for his role in the *Perez* case. R. 185.

By letter of April 9, 1991, Stoops informed petitioner that he had reaffirmed his decision to revoke petitioner's security clearance. R. 188-197. Respond-

ing specifically to petitioner's charge of retaliation, Stoops explained that he had based his action solely on the investigative record developed in connection with the information concerning petitioner's breaches of national security and fabrication of an official report. R. 189. On the basis of that record, Stoops stated, he was "unable to conclude with any confidence that the reinstatement of [petitioner's] security clearance would be consistent with the interests of national security." *Ibid.* Petitioner was advised that he could appeal the clearance revocation to the Department of Justice Security Officer (R. 197), and he did so on May 2, 1991 (R. 199-245), raising essentially the same arguments.

By letter of August 6, 1991, the Department of Justice Security Officer, D. Jerry Rubino, upheld the revocation of petitioner's Top Secret security clearance, based on an independent review of petitioner's file. R. 247-250. He relied for his decision solely on petitioner's admissions of "making multiple disclosures of National Security Information (NSI) to foreign nationals," particularly Cuban nationals (R. 247), and on petitioner's admitted fabrication of an official report (R. 249). On September 6, 1991, petitioner was notified by the FBI Associate Deputy Director for Administration that, because all agent positions require Top Secret security clearances, he would be dismissed because he was unable to perform the functions of a Special Agent. R. 252-253. The Director of the FBI subsequently informed petitioner's attorneys that he concurred with the dismissal decision. R. 264.

3. Petitioner sought review of the revocation of his security clearance and his dismissal by filing a motion for relief in the *Perez* litigation. Following a

hearing on that motion, the district court concluded that it lacked jurisdiction to review petitioner's contention that the FBI had retaliated against him in violation of Title VII when it revoked his security clearance. Pet. App. 5a-12a.

The court first addressed *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), which held that 5 U.S.C. 7513, governing appeals by federal employees from adverse personnel actions to the Merit Systems Protection Board (MSPB), does not give the MSPB authority to review Executive Branch agency decisions to revoke security clearances. It also considered *Webster* v. *Doe*, 486 U.S. 592 (1988), which held that the courts could review a constitutional equal-protection claim brought by a former employee of the Central Intelligence Agency (CIA), who asserted that he had been dismissed because he was homosexual. Pet. App. 6a-8a. The court noted that the Fifth Circuit had not addressed the applicability of the reasoning of *Egan* to the Title VII context, but it observed that three other courts of appeals had interpreted *Egan* "to give Executive decision making the broadest possible power to preclude judicial review." *Id.* at 7a.

The court then considered two Fourth Circuit decisions in which that court ruled that neither the Rehabilitation Act of 1973 nor Title VII provides for judicial review of security clearance determinations. Pet. App. 9a-11a (discussing *Jamil* v. *Department of Defense*, 910 F.2d 1203 (1990), and *Guillot* v. *Garrett*, 970 F.2d 1320 (1992)). In *Guillot*, the Fourth Circuit relied on *Egan* to hold that security clearance decisions may not be challenged under Title VII, because (it concluded) there is "no more an expression of congressional intent in * * * [Title VII] than in [5

U.S.C. 7513] that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal." 970 F.2d at 1325.

Following *Guillot*, the district court concluded that it lacked jurisdiction to review, under Title VII, the revocation of petitioner's security clearance. Pet. App. 11a-12a. It also indicated that petitioner could not make a claim based directly on the Constitution because the alleged retaliation "does fall under Title VII and thus Title VII is the sole vehicle for relief." *Id.* at 9a (citing *Brown* v. *GSA*, 425 U.S. 820 (1976)).

4. The court of appeals affirmed. Pet. App. 1a-4a. It concluded that, "[b]ecause the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking [petitioner's] security clearance, any Title VII challenge would of necessity require some judicial scrutiny of the merits of the revocation decision." *Id.* at 3a & n.5 (citing *Brazil* v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 116 S. Ct. 1317 (1996)). Accordingly, it concluded, "neither we nor the district court have jurisdiction to consider those matters." Pet. App. 4a.

Relying on *Egan*, the court stated that security clearances are "entrusted by law to the Executive." Pet. App. 3a n.6. It also remarked that " '[p]redictive judgments of this kind' properly are left to 'those with the necessary expertise in protecting [the sensitive material,]' rather than in the hands of 'an outside nonexpert body' or the equally nonexpert federal courts." *Ibid.* (quoting *Egan*, 484 U.S. at 529) (bracketed material added by court of appeals).

The court also ruled that petitioner could not bring a *Bivens* claim to challenge the revocation of his clearance. Pet. App. 4a. It held that such a claim is

precluded because Title VII provides the exclusive cause of action for federal employees who wish to assert claims of employment discrimination. *Id.* at 4a & n.8 (citing *Brown* v. *GSA*, *supra*).

ARGUMENT

1. Petitioner contends that, under Title VII of the Civil Rights Act of 1964, the courts may review the FBI's revocation of his security clearance to decide whether the FBI engaged in unlawful retaliation. The court of appeals' decision to the contrary is consistent with the decisions of the other two courts of appeals that have considered that issue, and it does not conflict with any decision of this Court. This Court recently denied review in another case presenting the same issue, *Brazil* v. *Department of Navy*, 116 S. Ct. 1317 (1996), and there is no reason for a different result in this case.

a. Both lower courts in this case, and the other courts of appeals that have considered the Title VII issue presented, relied upon this Court's decision in *Department of Navy* v. *Egan*, 484 U.S. 518 (1988). In *Egan*, the Court held that Congress had not authorized the Merit Systems Protection Board (MSPB) to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse federal personnel action. The text of the statute at issue in that case, 5 U.S.C. 7513, neither expressly provided for nor expressly precluded appellate administrative review over an agency's denial of a security clearance, and the respondent contended that the absence of express preclusion "create[d] a strong presumption in favor of appellate review." 484 U.S. at 526. The Court rejected that argument; it stated that, while, as a

general matter of administrative law, there may indeed be a presumption of appellate review of agency action, that proposition "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 526-527.

The Court also observed that "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official" (484 U.S. at 528), and that the decision-making involved is "an inexact science at best" (*id.* at 529). Because "[p]redictive judgments of this kind must be made by those with the necessary expertise[,] * * * it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk." *Ibid.* Accordingly, "unless Congress specifically has provided otherwise," courts should be reluctant to intrude on the authority of the Executive Branch to grant or deny security clearances. *Id.* at 530.

b. Relying on *Egan*, the courts of appeals have, thus far, unanimously concluded that Congress did not intend courts to review revocations of individual security clearances in the context of Title VII litigation. Petitioner contends (Pet. 11-12) that the decision below conflicts with the *McDonnell Douglas* framework for review of Title VII claims, because it gives him no opportunity to prove pretext. See

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973). The court of appeals concluded, however, that it was precisely the issue of pretext that presents a problem under *Egan*, for, it reasoned, if the courts considered the possibly pretextual nature of the FBI's proffered reasons for revoking the clearance, they would necessarily have to consider the merits of those reasons. See Pet. App. 3a. A similar decision of the Ninth Circuit takes the same view. In *Brazil* v. *Department of Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 116 S. Ct. 1317 (1996), which involved an allegation of a discriminatory revocation of a security clearance, the Navy proffered evidence, at the second stage of the *McDonnell Douglas* framework, that the plaintiff's clearance was terminated for legitimate, non-discriminatory reasons. Addressing the plaintiff's argument that he should be permitted to present evidence of pretext, the Ninth Circuit stated as follows:

> The second and third steps of the Title VII analysis present an insurmountable hurdle for Brazil. It is impossible for the court to establish in the first place whether the Navy's proffered reasons were legitimate without evaluating their merits. Even if the court were able to get by step two, it is very likely to be impossible for it to proceed to step three and determine whether the given reasons were mere pretext without considering their merits.

Id. at 197. The court held that it could not review the revocation of Brazil's clearance under Title VII.

In considering a claim of discrimination based on disability under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, which parallels much of Title

VII, the Fourth Circuit also relied on *Egan* to conclude that it could not review the Navy's revocation of the plaintiff's security clearance. *Guillot* v. *Garrett*, 970 F.2d 1320 (1992). After considering at length the statements in *Egan* that appellate bodies do not have authority to review security clearance decisions unless "Congress *specifically* has provided otherwise," *id.* at 1324, the court stated, "[w]e can discern * * * no more an expression of congressional intent in the provisions of the Rehabilitation Act or the Civil Rights Act of 1964 than in section 7513 of title 5 that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal." *Id.* at 1325.

The courts of appeals that have considered the question have therefore been unanimous in concluding that, since Congress has not expressly provided for such review, the merits of individual security clearance decisions should not be reviewed by courts under Title VII.[2] They have also reached similar conclusions about judicial review of security clearance denials under other statutes and in other contexts.[3]

---

[2] Petitioner's contention (Pet. 13), that the decision below conflicts with *South Dakota* v. *Bourland*, 508 U.S. 679 (1993), is incorrect. That case did not arise in the national security context, and therefore did not involve the concern, expressed in *Egan*, 484 U.S. at 529, about "outside, nonexpert" review of security clearance decisions.

[3] In *Dorfmont* v. *Brown*, 913 F.2d 1399 (1990), cert. denied, 499 U.S. 905 (1991), the Ninth Circuit affirmed the dismissal of a suit by an employee of a defense contractor, who challenged the revocation of her security clearance on due process grounds. The court held that the "reasoning [in *Egan*]

applies no less to the federal courts than to the MSPB. When it comes to security matters, a federal court is 'an outside nonexpert body'" without authority to review security clearance denials. 913 F.2d at 1401; accord *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1409 (10th Cir.), cert. denied, 488 U.S. 825 (1988).

In *Dubbs* v. *CIA*, 866 F.2d 1114 (1989), the Ninth Circuit held that a plaintiff could pursue a constitutional challenge to the denial of her security clearance, allegedly on the basis of her sexual orientation, as a violation of equal protection principles. That court also held, however, that the plaintiff could not challenge the denial of the security clearance under the Administrative Procedure Act.

The D.C. Circuit held in *United States Information Agency* v. *Krc*, 905 F.2d 389 (1990), that the Foreign Service Act does not give the Foreign Service Grievance Board jurisdiction to review the decision of a security program manager to withdraw a foreign service officer plaintiff from overseas postings, and that the court also did not have authority under the Administrative Procedure Act to review the decision.

Petitioner relies on a Policy Statement issued by the Equal Employment Opportunity Commission (EEOC) to argue that national security agencies are covered by Title VII. *EEOC: Policy Statements on National Security Defense to Bias Charges*, 8 Lab. Rel. Rep. (BNA) 405:6625 (May 1, 1989); Pet. 12-13. That Policy Statement, however, explicitly provides that the EEOC will not review the merits of security clearance decisions, and relies on *Egan* for that conclusion (8 Lab. Rel. Rep. (BNA) at 405:6626) (emphasis added)):

> The Supreme Court recently stated that nonexpert bodies cannot second guess the discretionary decisions of agency heads in determining who is qualified to receive security clearance [footnote citing *Egan*]. *The Commission is therefore precluded from reviewing the substance of security clearance decisions.* The Commission is also precluded from reviewing the validity of the security requirement itself. However, * * * the Commission is not precluded from determining whether the grant, denial or revocation

2. Petitioner also urges (Pet. 18-21) this Court to decide whether courts may entertain a challenge to the revocation of a security clearance based directly on the equal protection component of the Fifth Amendment, under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner failed, however, to plead a *Bivens* action, either in the underlying *Perez* complaint (R. 2, ¶ 2; R. 26-27, ¶¶ 1-3), or in his motion for relief filed with the *Perez* court (see R. 70-88). The second amended class complaint in the *Perez* litigation ostensibly raises claims under *Bivens* (R. 57), but that complaint does not purport to sue the officials named in the caption (the Attorney General and the Director of the FBI) in their individual capacities, nor does it name any other individual defendants. The district court's decisions in the class action rested entirely on Title VII. See *Perez* v. *FBI*, 707 F. Supp.

---

of security clearances is conducted in a nondiscriminatory manner.

Relying on that policy statement, the Commission has concluded on several occasions that it may not consider whether an individual's security clearance was denied or revoked for a discriminatory reason, and has reiterated that matters "within the rubric of a security clearance determination * * * [are] beyond the Commission's jurisdiction." *Schroeder* v. *Perry*, 1994 WL 735565 at * 3 (E.E.O.C. Apr. 14, 1994) (declining to consider whether placement of derogatory statements in security clearance file intended to discriminate on the basis of disability); *Fields* v. *Aspin*, 1993 WL 763357 at * 3 (E.E.O.C. Dec. 23, 1993) (declining to consider whether security clearance decision was discriminatory, because made on the basis of sex); *Phillips* v. *Dalton*, 1995 WL 95860 at * 3 (E.E.O.C. Mar. 3, 1995) (same, in case alleging race, national origin, age, and disability discrimination).

891 (W.D. Tex. 1988); 714 F. Supp. 1414, 1433 (W.D. Tex. 1989).

Similarly, petitioner's claims in his motion for relief were articulated solely under Title VII; he did not add any individuals to the caption of his motion, nor did he identify any unconstitutional conduct or attribute specific conduct to specific individuals. There is no suggestion that either of the individual defendants named in the complaint, Attorney General Edwin Meese and FBI Director William Webster, was personally involved in the revocation of petitioner's security clearance. A *Bivens* action may not be brought against a federal agency, see *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004-1006 (1994), and the same rule logically applies to actions brought against federal officials in their official capacity, see *Brandon* v. *Holt*, 469 U.S. 464, 471-472 (1985). Thus, petitioner did not properly plead a *Bivens* action.

In all events, the court of appeals' decision (Pet. App. 10a-12a) that a *Bivens* action is not available to challenge the revocation of a security clearance is consistent with the decision of the Ninth Circuit in *Brazil* v. *Department of Navy*, *supra*, the only other appellate decision that has addressed the matter. In the decision below, the court of appeals concluded (Pet. App. 4a) that petitioner's *Bivens* action was precluded by *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), which held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court concluded that the district court had "correctly relied on Supreme Court and Fifth Circuit precedent to the effect that Title VII provides the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims for employment discrimination," Pet.

App. 4a, and it cited *Brown* v. *GSA* for that proposition, *id.* at 4a n.8. In *Brazil*, the Ninth Circuit held, for the same reason and also in reliance on *Brown*, that a *Bivens* action is not available for discrimination claims in security clearance cases. 66 F.3d at 197-198.

Contrary to petitioner's suggestion (Pet. 19), the decision below does not conflict with *Davis* v. *Passman*, 442 U.S. 228 (1979). That case involved a congressional employee who (unlike petitioner) was at the time excluded entirely from the protection of Title VII and had no statutory remedy at all (in damages or otherwise) for employment discrimination. Although the court of appeals in this case did not address *Davis* v. *Passman*, the Ninth Circuit observed in *Brazil* that, in situations like this one, unlike that in *Davis* v. *Passman*, "Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, [and] *Bivens* actions should not be implied." See *Brazil*, 66 F.3d at 198.

Petitioner also seeks support from *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), in which the Court held that Congress had not foreclosed the courts from reviewing a "colorable constitutional claim" that the respondent in that case had been discharged from the Central Intelligence Agency on the basis of sexual orientation. *Webster*, however, was a suit for reinstatement, not a *Bivens* action for damages; the complaint in that case did not request damages from any individual federal official. *Id.* at 596-597. It is therefore of little relevance to a determination

whether a *Bivens* action can be brought.[4] Moreover, although (as petitioner notes, Pet. 18), the Court stated in *Webster* that claims "attacking the hiring and promotion policies of the [CIA]" were already being heard by the federal courts, those claims do not necessarily involve the issue of the grant or denial of a security clearance.

3. We also note that the President has recently established an administrative remedy for claims of discrimination in security clearance decisions. On August 2, 1995, the President issued Executive Order No. 12,968, which states that "[t]he United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information." Exec. Order No. 12,968, § 3.1(c), 60 Fed. Reg. 40,250 (1995). The Order provides for administrative review of revocations or denials of security clearances; it also provides that an employee who has received an adverse security clearance decision must be given a statement of reasons for the decision, and has the right to respond, the right to representation by counsel, and the right to appeal to a high-level panel within the agency. § 5.2, 60 Fed. Reg. 40,252. Although the actions here preceded the issuance of Executive Order No. 12,968, petitioner had the benefit of similar administrative procedures. He was provided with a statement of reasons for the suspension of his security clearance. He availed himself of the opportunity to respond to those reasons, and a final

---

[4] The courts below addressed only whether petitioner could bring a *Bivens* action for damages. The case does not raise, and we do not address, the question whether any equitable cause of action under the Constitution might be available.

decision regarding revocation was made by an official other than the FBI security programs official.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

MAY 1996